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The Ghosts in the Probate File: Kentucky Probate and Estate Administration through an Elder Law Lens

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THE GHOSTS IN THE PROBATE FILE: ESTATE ADMINISTRATION THROUGH AN ELDER LAW LENS
A PRESENTATION FOCUSING ON ELDERLY OR SPECIAL NEEDS DECEDENTS AND BENEFICIARIES

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Whether they recognize it or not, Kentucky attorneys increasingly administer estates affected by elder law and special needs issues, including prior or existing guardianships, public benefits received by the elder decedent or beneficiaries,[1] special needs trusts and related arrangements,[2] and capacity concerns that may complicate administration. These materials examine probate and estate administration from the perspective of two experienced elder law practitioners,[3] beginning with the decedent's circumstances and then turning to surviving beneficiaries whose age, disability, or benefits status may affect administration strategy, fiduciary duties, and post-death obligations. Navigating these representations also demands a firm grasp of the unique ethical responsibilities that arise when interests and capacities collide. To that end, this presentation serves as a guide for attorneys to identify these hidden complexities, address them effectively, and recognize when specialized counsel is required.

I. WHEN THE *DECEDENT* WAS ELDERLY, DISABLED, OR RECEIVING PUBLIC BENEFITS

A. When Elder Law Considerations Are at Play

In Kentucky, the definition of an elderly person often depends on the statutory context. In some cases, the age may be as young as 55.[4] Generally, however, when the term elder is used, it refers to someone over the age of 65.[5] Regardless of the specific chronological marker, practitioners must be able to identify indicators that elder law considerations are implicated in a probate or administration matter. These issues typically arise when the decedent:

[1] Typically, these include Medicaid (long-term care and waiver programs), Supplemental Security Income (SSI), and VA benefits (*e.g.,* DIC, Aid & Attendance).

[2] These include existing third-party special needs trusts, pooled trusts, ABLE accounts, and other custodial accounts.

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[4] In 907 KAR 1:585 Estate Recovery, "aged institutionalized individual" is defined as a recipient of benefits who is 55 or older.

[5] For example, KRS 132.810 (homestead exemption), KRS 365.245 (Protection from Financial Exploitation Act).

- Met the state or federal criteria for being elderly, infirm, disabled, or similarly vulnerable;
- Was subject to a guardianship, conservatorship, or curatorship;
- Was receiving Long-Term Care (LTC) Medicaid or waiver program benefits;
- Was enrolled in/receiving SSI, SSDI, Medicare, Medicaid, or a combination thereof; or
- Was receiving VA disability compensation, VA pension, or Aid & Attendance.

A decedent's age or disability often serves as a gateway indicator. Where one of these factors exists, there is an increased likelihood that the others are also present. Consequently, intake forms for probate and estate administration should include specific screening questions addressing each of these areas to ensure the fiduciary is properly advised.

B. Closing Existing Guardianship and Conservatorship Cases[6]

Where a decedent was under guardianship or conservatorship, specific steps must be taken to close out the cases.[7] In Kentucky, a guardian manages personal and healthcare decisions (KRS 387.010(3)), while a conservator manages financial affairs (KRS 387.010(5)). The guardian's authority terminates by operation of law upon the ward's death. The guardian must provide a certified death certificate to the court. Some courts prefer the filing of a final report and a motion to be relieved of duty.

The conservator's final duties are more rigorous. Per KRS 387.710, the conservator must file a final report and accounting to close the case. This filing must include: (1) a comprehensive account of all income and expenditures since the last periodic report (or since the initial inventory if no prior report was filed); (2) any final fiduciary fees sought must be approved by the court prior to the submission of the final report; and (3) AOC Form 856 (Periodic/Final Settlement). This form must be submitted with documentation proving that all remaining funds in the conservatorship accounts have been transferred to the personal representative (executor or administrator) of the decedent's estate. Only after the court approves the final settlement can the surety bond be released. Move swiftly to secure this release to ensure the fiduciary is protected and to capture any potential bond premium refunds for the estate.

C. Medicaid and Estate Recovery

Medicaid estate recovery (MER) is a federally mandated process that requires states to seek reimbursement from the estates of deceased Medicaid recipients for the costs of long-term care and related services paid on their behalf. The program aims to ensure that public funds remain available to support individuals who lack the financial means to afford care.

[6] KRS 387.710 details the final report and accounting requirement.

[7] Curatorship under KRS 387.320 *et. seq.* may also exist at the time of death. The presiding court should be notified and any required final reporting tendered to the court.

1. Was there Medicaid?

   Any intake interview for a probate or estate administration matter must include a formal screening to determine if the decedent received Medicaid subject to recovery. In Kentucky, Medicaid provides services either in institutional settings or through community-based ***waiver*** programs – such as the Home and Community Based (HCB), Michelle P., Supports for Community Living (SCL), or Acquired Brain Injury (ABI) waivers.

2. Is the asset part of the estate?

   Under 907 KAR 1:585, which implements the federal mandate found in 42 U.S.C. §1396p(b)(1), the Commonwealth is authorized to recover the cost of these benefits from the estates of recipients aged 55 and older. Practitioners must caution clients that Kentucky utilizes an expanded definition of ***estate*** that reaches far beyond traditional probate assets. Under the regulation, the estate includes:

   > (a) All real and personal property or other assets owned by the deceased recipient that would be included as probate property under Kentucky law; and
   > (b) All real and personal property or other assets in which the deceased recipient had legal title or interest at the time of death, to the extent of the recipient's interest, whether the asset was conveyed to a survivor, heir, or assign… through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.[8]

   Critically, the Commonwealth evaluates estate recovery based on the decedent's interest in the moment *immediately prior* to death. This means assets that technically pass by operation of law (non-probate) remain subject to the MER claim.[9] While the Department for Medicaid Services (DMS) has historically shown an enforcement preference by not aggressively pursuing assets such as retirement accounts and life estates, this is a matter of administrative policy – not a statutory prohibition – and is subject to change without notice.

   Statutory and regulatory exceptions offer the primary defenses against a MER claim. Under 907 KAR 1:585 §3, the Commonwealth is prohibited from recovering against the estate of a recipient if there is a surviving spouse or

[8] 907 KAR 1:585(3): Note that the inclusion of life estates and living trusts in this regulatory definition is what allows Medicaid to bypass the traditional probate shield that many general practitioners assume protects these assets.

[9] 907 KAR 1:585 §1(3).

a surviving child who is under age 21, blind, or disabled.[10] Furthermore, Kentucky administrative policy generally provides a *de minimis* exception where recovery is waived if the total value of the estate is *less than $10,000*.[11]

Beyond these categorical bars, DMS has the discretion to grant *hardship* exemptions. These may be based on factors such as the medical expenses of a beneficiary or the continuing education expenses of an heir.[12] Experienced practitioners report that general hardship exemptions are rarely granted in practice. A notable exception is the family farm or business. The regulation specifically identifies the conveyance of a family-owned farm or business to a surviving family member as a valid ground for exemption.[13] Crucially, the regulation clarifies that rental properties do not qualify as a family business for this purpose.[14]

3. Who has a duty to notify?

When representing a fiduciary, counsel must immediately verify the decedent's history with Medicaid. While 907 KAR 1:585 requires service providers to notify DMS of a recipient's death, the fiduciary should not wait for the state to act. Once DMS is aware of the death, they will issue a formal written notice of the claim to the estate representative (or to heirs if no representative is appointed) pursuant to 907 KAR 1:585 §4(4).

Notably, the Commonwealth is not bound by the standard six-month creditor claim period under KRS 396.011.[15] Because Medicaid applicants must provide their will and name their nominated executor during the initial application process, the Third-Party Liability (TPL) Division often sends a recovery letter directly to that representative shortly after death. This letter typically includes (1) the total amount of the Medicaid lien; (2) a 30-day deadline for repayment; and (3) instructions on asserting exemptions or hardships.

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[10] 907 KAR 1:585 §3(1)-(2) (prohibiting recovery while there is a surviving spouse or surviving child) and 907 KAR 1:585 § 1(11) (defining "surviving child" as a living child under age 21 or a child who is blind or disabled as defined in 42 U.S.C. §1382c); *see also* 42 U.S.C. §1382.

[11] 907 KAR 1:585 §3(4): Practitioners should verify the current administrative cost-effectiveness threshold, as the Cabinet may adjust what it deems not cost-effective to pursue.

[12] 907 KAR 1:585 §3(5).

[13] 907 KAR 1:585 §3(3).

[14] 907 KAR 1:585 §3(3)(a).

[15] KRS 396.011 (claims of the Commonwealth of Kentucky are excluded from the standard time limitations).

If no such letter is received, the personal representative has an affirmative duty to request the claim amount to ensure the estate can be cleared. Inquiries should be directed to:

Department for Medicaid Services[16]
Third Party Liability Branch
275 E. Main St., 6E-A
Frankfort, KY 40621
Phone: (502) 564-4958

4. How do I request an exemption?

All requests for exemptions or detailed accountings must be submitted in writing to the DMS once the initial recovery letter is received. DMS will provide a written response to any such request. If an exemption is granted, the personal representative must retain the written confirmation for their records. If a formal claim was previously filed in probate court, counsel should ensure a corresponding release of claim is filed to clear the record. Unless a valid exception applies, the Medicaid claim remains a high-priority debt, taking precedence over all other claims except for those of secured creditors, the federal government, and the prioritized costs of administration.

a. Survivor's exemption.

In Kentucky practice, results vary on whether DMS will honor the KRS 391.030 statutory exemption, which sets aside up to $30,000 in personal property or money for a surviving spouse or children. While 907 KAR 1:585 §3 strictly prohibits recovery if a spouse or a minor/disabled child survives, the $30,000 exemption provides a secondary layer of protection for assets that might otherwise be reachable. Experienced practitioners have occasionally succeeded in carving out this exemption before satisfying a lien for adult children who are neither minors nor disabled, despite facing administrative resistance. Counsel should always assert this exemption to secure immediate liquidity for surviving family members who do not fall under the automatic federal "no recovery" categories.[17]

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[16] *Medicaid Estate Recovery*, Kentucky Cabinet for Health & Family Services, https://www.chfs.ky.gov/agencies/dms/dpi/tpl/Pages/estaterecovery.aspx (last visited May 14, 2026).

[17] It is critical to distinguish between the categorical bar and the statutory set-aside: Under federal law and 907 KAR 1:585 §3, the mere existence of a surviving spouse or a disabled/minor child acts as an absolute bar to Medicaid estate recovery. In contrast, the KRS 391.030 exemption is the specific mechanism used to extract up to $30,000 from the estate for the family's immediate use, shielding those funds from all general creditors regardless of the Medicaid lien's size. Children who are not minors or disabled are not protected by the federal bar but are covered by the Kentucky $30,000 exemption.

b. Negotiation.

It is often possible to negotiate the MER claim. The personal representative, supported by clever and capable counsel, should present a persuasive narrative as to why the claim should be settled for a lesser amount. While DMS is bound by regulation, they possess a degree of administrative discretion when presented with compelling equitable factors, such as a needy family member who has resided in the property for years or an heir who provided substantial caregiving that delayed the decedent's institutionalization. While a reduction is never guaranteed, the cost of litigation and the potential for a hardship finding often make the Commonwealth amenable to a reasonable settlement.

5. Priority of administrative expenses.

Finally, it is vital to remember the pecking order of probate. Under Kentucky law, certain obligations take absolute precedence over the claims of general creditors, including DMS. Pursuant to KRS 396.095, the order of payment begins with the costs and expenses of administration. This includes court costs, bond premiums, the personal representative's fiduciary fee, and reasonable attorney's fees. Closely following administrative costs are funeral expenses, which are granted high-priority status to ensure the decedent is buried with dignity before the estate's assets are exhausted by creditors. Ensure that these top-tier expenses are properly documented and paid from the estate's first available assets. Both the machinery of the probate process and the final arrangements for the decedent should be fully funded before the Commonwealth's recovery claim is satisfied.

6. Beyond the *Medicaid Manual*.

While this overview covers the standard operational hurdles, it does not exhaust the potential for constitutional challenges regarding the expanded estate definition or the nuances of trusts. As administrative policies shift, practitioners should remain vigilant for updates to the cost-effectiveness thresholds and evolving DMS interpretations of exemptions, hardship, and estate subject to recovery.

D. SSI/RSDI Post-Death Administration

Many decedents are receiving Supplemental Security Income (SSI) or Retirement, Survivors, and Disability Insurance (RSDI) payments at the time of their death. Because the Social Security Administration (SSA) maintains strict rules regarding eligibility for the month of death, these payments often must be returned or will be automatically drafted back out of the decedent's account by the Treasury.[18]

[18] USAGov, *Report the death of a Social Security or Medicare beneficiary* (last updated Jan. 16, 2026), https://www.usa.gov/social-security-report-a-death.

1. SSI.

SSI is a needs-based monthly benefit for individuals who are aged, blind, or disabled and lack sufficient work credits for standard Social Security. For 2026, the maximum federal SSI payment for a single individual is $994 per month.[19] Unlike other benefits, SSI is paid for the current month. Critically, the recipient must be alive *for the entirety of that month* to be entitled to the payment. Any payment received in or after the month of death must be returned.[20] For example, if a recipient dies on May 31st at 11:55 p.m., the payment received for May was technically unearned because the recipient did not live to the end of the month. The payment must be returned to the SSA.[21] Practitioners should advise fiduciaries to notify the decedent's financial institution immediately, as the bank is generally required to return these improper deposits upon notice of the death.

2. RSDI.

For RSDI payments, benefits are *paid in arrears*. This means that a payment received in April is for the month of March.[22] To be entitled to a payment, a recipient must live through the entirety of the month for which the payment is made. The SSA does not pro-rate benefits for the month of death.[23] Here are two scenarios to explain how this works in practice.

- **Scenario A**: If a decedent died on April 5th and an RSDI check was received on April 10th, that check may be retained because it represents the benefit for March – a month the decedent fully survived.
- **Scenario B**: If a decedent died on March 30th and a check was received on April 10th, those funds are not earned and must be returned, as the decedent did not survive the full month of March.

An attorney advising the estate administrator or other fiduciary shall inform them of these duties:

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[19] *SSI Federal Benefit Rates*, Soc. Sec. Admin., https://www.ssa.gov/oact/cola/SSIamts.html.

[20] 20 C.F.R. §416.1334 – Termination due to death of recipient.

[21] Social Security Administration, *How Social Security Can Help You When a Family Member Dies*, Pub. No. 05-10008 (Apr. 2026), *available at* https://www.ssa.gov/pubs/EN-05-10008.pdf.

[22] Soc. Sec. Admin., SSA Pub. No. 05-10008, *How Social Security Can Help You When a Family Member Dies* (Apr. 2026), *available at* https://www.ssa.gov/pubs/EN-05-10008.pdf.

[23] 42 U.S.C. §402(a) and SSA POMS GN 02408.001.

a. Notification.

Provide the decedent's Social Security number to the funeral home, as they typically notify the SSA of the death. The personal representative should follow up directly with the SSA to ensure the record is closed.

b. Handling payments:

Any unearned payments must be returned. For direct deposits, notify the bank immediately and request a reclamation to return the funds to the Treasury. Paper checks should not be cashed. Return them to the local Social Security office.

c. Lump-sum death payment.

A one-time $255 benefit may be payable to a surviving spouse if they were living with the decedent at the time of death If there is no surviving spouse, an eligible child may receive the payment.[24]

d. Survivor benefits:

If the decedent has a surviving spouse or a child who became disabled before age 22, they may be eligible for monthly benefits based on the decedent's work history.[25]

3. Representative payee.

If the benefit recipient was unable to manage their funds, the SSA may have appointed a representative payee. Their legal authority to manage or spend funds terminates immediately upon the death of the beneficiary. The representative payee must, however, submit a final accounting and assert and protect conserved funds that belong to the decedent's estate and should, thus, not be returned to the SSA.[26]

E. Veterans

The Department of Veterans Affairs (VA) offers several benefits, including lifetime benefits, survivor benefits, and burial allowances. Identify these benefits early to ensure the estate handles final expenses and benefit reconciliations correctly.

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[24] 20 CFR §404.390.

[25] Social Security Administration, *Who can get Survivor benefits*, https://www.ssa.gov/survivor/eligibility.

[26] SSA POMS GN 00603.010.

1. Funeral, burial, and transportation of remains.

The VA provides financial and commemorative benefits to honor deceased veterans and support their families.[27] Some of the benefits include:

- **Service-connected deaths**: Up to $2,000 for deaths occurring on or after September 11, 2001. There is no time limit to file.
- **Non-service-connected deaths**: Smaller allowances are available if the veteran was receiving a VA pension/compensation or died in a VA facility. Claims must typically be filed within two years of burial.
- **Transportation**: Costs for transporting remains may be covered if the death occurred under VA-authorized care.

Veterans with any discharge status other than dishonorable are eligible for burial in a VA National Cemetery at no cost.[28] The service includes opening/closing of the grave and perpetual care. Spouses and some dependents are also eligible (even if they die before the veteran). Veterans can apply for a pre-need letter to confirm eligibility before death.[29]

Regardless of where the veteran is buried, the following honors are available:

- **Grave markers**: Free headstones, markers, or medallions for any cemetery.
- **Burial flags**: A United States Flag to drape the casket or accompany the urn.
- **Military honors**: Includes the folding of the flag, the playing of *Taps*, and a funeral honors detail.
- **Special requests**: Naval veterans may also coordinate burial at sea.[30]

2. Benefit recipient.

When a veteran receiving disability or pension benefits passes away, estate representatives must promptly address the finality of those payments. The veteran must have lived through the *entire calendar month* to be entitled to that month's funds. There are no prorated or partial payments. If the veteran

[27] Submit VA Form 21P-530EZ via the VA Burial Benefits portal: https://www.va.gov/burials-memorials/veterans-burial-allowance/.

[28] *Eligibility for Burial in a VA National Cemetery*, U.S. Dep't of Veterans Affs., https://www.va.gov/burials-memorials/eligibility/.

[29] *Pre-Need Eligibility Determination for Burial in a VA National Cemetery*, U.S. Dep't of Veterans Affs., https://www.va.gov/burials-memorials/pre-need-eligibility/.

[30] *Burial at Sea*, U.S. Dep't of Veterans Affs., https://www.va.gov/burials-memorials/eligibility/burial-at-sea/.

dies mid-month, the payment arriving at the beginning of the following month is generally considered an overpayment and must be returned.

Representatives should contact the VA Debt Management Center[31] to coordinate the return of funds and avoid aggressive collection efforts. In cases where repayment would cause significant financial strain, the estate may request a *hardship waiver*. Furthermore, if the veteran had a court-appointed or VA-authorized fiduciary managing their finances, that individual is required to file a final report and transfer any remaining funds in the fiduciary account to the estate representative for final distribution.

Beyond managing debt, it is beneficial for representatives to alert the family to potential survivor benefits. While not a duty of the estate counsel, flagging eligibility for Dependency and Indemnity Compensation (DIC) or a survivor's pension is a kindness as it can provide critical long-term support. Detailed eligibility requirements and application steps for these programs are available through the Survivor's Portal.[32] Survivors can find local attorneys or other agents who have VA certification on the VA's website.[33]

F. Special Needs Planning Tools Owned by Decedent

1. First-party trust.

First-party special needs trusts (1PSNTs) are designed to allow individuals under age 65 to hold assets while remaining eligible for SSI and Medicaid. Federal law requires that upon the beneficiary's death, the trust must reimburse the state for the total amount of Medicaid benefits provided during their lifetime. The trustee should contact the DMS Third-Party Liability Unit,[34] which manages trust recoveries.

2. Pooled SNT.

The process differs slightly for those enrolled in a pooled special needs trust. In this scenario, the trust organization itself manages the distribution of funds to DMS to satisfy the Medicaid claim. Once the state is reimbursed, any remaining funds are distributed to the remainder beneficiaries identified in the original joinder agreement.

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[31] *Manage Your VA Debt*, U.S. Dep't of Veterans Affs., https://www.va.gov/manage-va-debt/.

[32] *VA Benefits for Spouses, Dependents, Survivors, and Family Caregivers*, U.S. Dep't of Veterans Affs., https://www.va.gov/family-member-benefits/.

[33] *Find a VA Accredited Representative*, U.S. Dep't of Veterans Affs., https://www.va.gov/get-help-from-accredited-representative/find-rep/.

[34] *Third Party Liability Section*, Kentucky Cabinet for Health & Family Services, https://www.chfs.ky.gov/agencies/dms/dpi/tpl/Pages/default.aspx.

3. STABLE accounts and ABLE programs.

The decedent may have held a STABLE account, Kentucky's version of a tax-advantaged ABLE account. These accounts allow disabled individuals to save and grow funds tax-free. Upon the owner's death, funds can first be used to pay for outstanding qualified disability expenses, such as final medical bills or funeral and burial costs. Any remaining balance is generally paid out to the estate representative. While federal law allows states to claim remaining funds for Medicaid reimbursement, Kentucky law limits these claims to only what is strictly required by federal mandates. For more detailed guidance on ABLE account closures, you can visit the official website.[35]

II. WHEN THE *BENEFICIARY* WAS ELDERLY, DISABLED, OR RECEIVING PUBLIC BENEFITS

A. Identifying At-Risk Beneficiaries

It is not uncommon for heirs and beneficiaries to be elderly, disabled, or otherwise vulnerable. For these individuals, the receipt of a direct inheritance is not merely a financial windfall; it is a potential threat to their stability. Because of this, all probate, trust, and estate counsel should understand the circumstances of the potential heirs and beneficiaries.

Some beneficiaries rely on public benefits such as SSI or Medicaid. Because these programs are strictly means-tested, an outright inheritance can cause a beneficiary to become over-resourced, triggering an *immediate* loss of benefits. The risk is particularly acute for long-term care residents (*i.e.,* individuals in nursing homes or assisted living whose care is funded by Medicaid or VA Aid & Attendance), waiver participants (*i.e.,* those enrolled in Kentucky's specialized Medicaid waivers, such as Michelle P. or Supports for Community Living (SCL), which provide critical home and community-based services), and VA pension recipients (veterans or surviving spouses who receive means-tested pensions (distinct from non-means-tested disability compensation)).

Early identification of these at-risk beneficiaries is a critical first step. It allows the fiduciary and counsel to explore protective measures – such as special needs trusts or disclaimers – before a distribution is made and inadvertent harm becomes permanent.

B. Impact of Inheritance on Eligibility

When an heir or beneficiary receives the asset of a decedent, the government views this as a countable resource. Unless the inheritance is redirected or protected, it can result in the immediate and total loss of monthly income and medical coverage.

[35] https://stablekentucky.com.

1. SSI and Medicaid.

For those receiving Supplemental Security Income (SSI) and Medicaid (including waiver programs), the resource limit is strictly set at $2,000 for an individual. These countable resources include nearly all assets that can be converted to cash, such as bank accounts, stocks, and real property (other than a primary residence). If a beneficiary receives an inheritance that pushes their assets above $2,000, their monthly SSI check will stop, and their Medicaid coverage will be suspended.

For someone in a nursing home, losing Medicaid eligibility due to a $50,000 inheritance is catastrophic. Unless it is dealt with promptly and properly, the beneficiary will be kicked off benefits and have to use the inheritance to pay for care. It will be entirely depleted within a few months of care as the cost may be $15,000-$20,000 per month. This leaves the beneficiary in the exact same financial position as before, but without their previous benefits and without the means to hire an attorney to fix the issue. If the problem had been proactively addressed, the attorney's fees to do so could have been pulled from the inheritance and some of the funds preserved for the benefit of the nursing home resident.

2. VA benefits.

The impact of an inheritance on VA benefits depends entirely on the program in which the veteran is enrolled. VA Disability Compensation (DIC) is not means-tested. It is based on a service-connected disability rating. Receipt of an inheritance will not affect these payments. VA pensions are means-tested. For 2026, the net worth limit is $163,699. This "net worth" calculation includes the veteran's assets plus their annual income. As with Medicaid, the primary home and one vehicle are generally excluded. The VA has a three-year look-back period. Attempting to gift away an inheritance to meet the net worth limit can trigger a penalty period of ineligibility for up to five years.

C. Planning Tools for Vulnerable Beneficiaries

When an inheritance threatens benefit eligibility, several legal tools can be employed to protect the assets and the beneficiary's quality of life. The appropriateness of each tool depends upon the beneficiary's needs and circumstances, the estate assets, and the current oversight by other courts and government entities. For example, the tool used for a 26-year-old SSI recipient might not work for a 76-year-old Medicaid long-term care recipient.

1. Third-party special needs trusts (SNTs).

A third-party SNT is the best tool for protection. It is established by someone other than the beneficiary (*e.g.,* a parent or grandparent) using the grantor's own assets. Since the money never belonged to the beneficiary, there is no Medicaid payback requirement upon their death. The trust must be set up in

advance via a last will and testament (testamentary trust) or as a standalone *inter vivos* trust. Assets must be titled in the trust's name or pass by beneficiary designation to the trust.

2. First-party special needs trusts (d4A).

   If the decedent did not plan ahead and the beneficiary inherits assets directly, a first-party SNT (governed by 42 U.S.C. §1396p(d)(4)(A)) may be used if the beneficiary is age 64 or younger. The trust must include a provision to reimburse the state for medical assistance paid during the beneficiary's life upon their death. Due to the difficulty of drafting these trusts and the strict requirements for reporting and administration, a skilled practitioner should be used.

3. Pooled trusts.

   Operated by non-profit organizations (*e.g.,* Life Plan of Kentucky or the Kentucky Guardianship Association), pooled trusts manage individual sub-accounts under one master trust. In Kentucky, these are available to beneficiaries of any age and are ideal for smaller inheritances where the cost of a private attorney/trustee is impractical. Like first-party SNTs, they require a Medicaid payback.

4. STABLE accounts (ABLE accounts).

   For individuals whose disability began *before age 46*,[36] a STABLE account is a powerful, low-cost option. Annual contributions are capped at $20,000 for non-working beneficiaries. Those who are gainfully employed can contribute more. SSI payments are only suspended if the account balance exceeds $100,000, but Medicaid remains active regardless of the balance (up to state limits). Unlike SNTs, STABLE funds can be used for housing and food without an SSI penalty.

5. Uniform Transfers to Minors Act (UTMA)

   While UTMA accounts protect assets for minors, they become fully countable for SSI/Medicaid at age 18. Upon reaching adulthood, these funds should be transitioned into a STABLE account or first-party SNT to preserve benefit eligibility.

[36] Under the prior rules of *Achieving a Better Life Experience (ABLE) Act of 2014*, the accounts were restricted to those whose disability onset occurred before the age of 26. Under the *ABLE Age Adjustment Act of 2022*, the age was raised to 46 as of January 1, 2026.

6. Traditional Medicaid crisis planning:

For beneficiaries already in skilled nursing care (such as a surviving spouse), an inheritance is often spent down on care. If a testamentary spousal support trust was not established by the decedent,[37] the beneficiary should immediately consult an elder law attorney. Even without prior planning, crisis planning can often preserve 50% or more of the assets for the family. The alternative is to expend the funds for care costs.

III. ETHICS AND PROFESSIONAL RESPONSIBILITY IN PROBATE

Practitioners must balance their duties to the personal representative with the ethical complexities of dealing with vulnerable third parties. In some cases, the law and court policy impose additional duties. When in doubt, ask for court guidance and the appointment of a guardian *ad litem* (GAL) attorney.

A. Conflicts of Interest

Identifying the client is the cornerstone of ethical probate practice. Attorneys must avoid the tender-hearted trap of attempting to represent both the fiduciary and the beneficiaries. Under SCR 3.130(1.7), you must explicitly state that you represent the personal representative, not the estate, or its beneficiaries. While you can alert beneficiaries to potential benefit risks, you must advise them that you do not represent their individual interests and provide a referral to independent counsel. Use a written retainer agreement that clearly defines the scope of representation, fee structures, and potential conflicts.[38]

B. Capacity and Undue Influence Concerns

Capacity issues are not limited to the execution of estate documents. They pervade estate administration. Attorneys representing such clients must identify red flags early and determine if protective action is necessary. SCR 3.130(1.14) provides guidance when a client (such as an elderly surviving spouse serving as personal representative) shows signs of diminished capacity. When dealing with beneficiaries who may lack capacity but are required to sign releases or court documents, counsel must remain mindful of their obligations to unrepresented persons and their duty of candor to the tribunal. Ask for court guidance or a GAL appointment.

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[37] A testamentary SNT is an elder law practitioner gold standard clause in a spousal will. It is the only way to satisfy both the requirements of Medicaid eligibility and the Kentucky spousal share rules within a will. *See POMS SI 01120.200, et. seq*.

[38] *See* SCR 3.130(1.5) and (1.6).

C. Fiduciary Duty and Oversight

The personal representative (PR) owes a strict duty of loyalty and care to the estate. When a beneficiary receives public benefits, the PR's duty includes ensuring the beneficiary is aware of how the inheritance might impact them. Counsel should warn the PR and beneficiaries that a disclaimer of inheritance is often treated by Medicaid and the SSA as a transfer of resources, which can trigger a period of ineligibility.

Under SCR 3.130(1.1), an attorney must provide competent representation. If you are not well-versed in the nuances of special needs or elder law, you have an ethical obligation to either become informed or refer the beneficiary to specialized counsel.

IV. CONCLUSION

Modern probate demands proactive screening for elder law and public benefit issues to prevent catastrophic financial losses for vulnerable families. Beyond filing forms, practitioners must ensure ethical compliance through clear communication of representation, timely referrals to specialized counsel, and a firm grasp of how inheritances impact benefit eligibility.

Under SCR 3.130(1.1), an attorney's duty of competence requires identifying these "ghosts" early – specifically Medicaid recovery and over-resourced beneficiaries – to protect the interests of both the fiduciary and the heirs. Ultimately, a successful administration is measured not just by the closing of the court file, but by the preservation of the decedent's legacy and the continued stability of their most vulnerable beneficiaries.

APPENDIX: PROBATE INTAKE CHECKLIST FOR ELDER LAW AND SPECIAL NEEDS ISSUES

This checklist is intended as a practical screening tool for probate and estate administration matters involving elderly, disabled, or otherwise vulnerable decedents and beneficiaries. Not every item will apply in every case, but early identification of these issues can help prevent missed reporting obligations, benefit loss, and avoidable administration problems.

1. Decedent Screening

- Was the decedent elderly, disabled, infirm, or otherwise vulnerable?
- Was the decedent residing in a nursing home, assisted living facility, or other long-term care setting?
- Was the decedent receiving Medicaid, Medicaid waiver services, SSI, SSDI/RSDI, Medicare, VA disability compensation, VA pension, or Aid and Attendance?
- Was there an open guardianship, conservatorship, or curatorship at the time of death?
- Did the decedent have a representative payee, VA fiduciary, agent under power of attorney, or court-appointed fiduciary?
- Was the decedent the beneficiary of a first-party special needs trust, pooled trust, or STABLE/ABLE account?

2. Estate Recovery and Benefit Repayment Issues

- Is Medicaid estate recovery likely to apply?
- Has notice of death been provided or received from DMS, Social Security Administration, or the Department of Veterans Affairs?
- Were any SSI, RSDI, VA, or other government payments received after death that may need to be returned?
- Are there known exceptions, hardship arguments, or exemption issues that should be explored?
- Has the personal representative requested payoff or claim information from the relevant agency when needed?
- Are there any fiduciary accountings, final reports, or turnover obligations that must be completed?

3. Beneficiary Screening

- Is any beneficiary elderly, disabled, cognitively impaired, or otherwise vulnerable?
- Is any beneficiary currently receiving SSI, Medicaid, waiver services, VA pension, or other means-tested benefits?
- Would an outright distribution likely cause loss of benefits or create over-resource problems?
- Is any beneficiary in a nursing home or likely to need long-term care Medicaid soon?
- Is any beneficiary a minor who may require a UTMA account or other protective arrangement?
- Should any beneficiary be referred to elder law, special needs, or public benefits counsel before accepting a distribution?

4. Planning Tools and Protective Options

- Does a third-party special needs trust already exist under a will or trust?
- Should the beneficiary explore a first-party special needs trust?
- Would a pooled trust be a better fit for the amount involved or the family's circumstances?
- Would a STABLE/ABLE account be an appropriate option?
- Are disclaimer issues present that could create transfer-of-resource concerns?
- Should traditional Medicaid planning be explored for a surviving spouse or other beneficiary already in long-term care?

5. Ethics and Representation

- Who is the client: the personal representative, a proposed fiduciary, or another individual?
- Has counsel clearly explained to beneficiaries who is and is not represented?
- Are there capacity, undue influence, or exploitation concerns affecting any party?
- Does any interested person need independent counsel?
- Are referrals needed to elder law, special needs, Medicaid, VA, or Social Security counsel?
- Have these issues been documented in the file and addressed early in the administration?